Supreme Court of the United States

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. .....

CITY OF LONG BEACH, a municipal corporation, SIGURD O. OUGLAND, and J. A. JACOBSON & COMPANY, INC., a corporation,

Petitioners,

vs.

NATIONAL DEVELOPMENT COMPANY, a corporation, *et al.,*

Libelants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is the Petition of City of Long Beach, a Municipal Corporation, Sigurd A. Ougland, and J. A. Jacobsen & Company, Inc., a Corporation, for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered on the 3rd day of April, 1961, affirming the Interlocutory Decree of the District Court in favor of the Libelants

and against Petitioners. Petition for Rehearing denied June 2, 1961.

1. The District Court rendered two Opinions, the first one of which is found in the record at Page 42, the second one of which is reported in 187 Fed. Supp. 109, and in the record at page 50. The opinion of the Ninth Circuit is appended hereto, and reported in 289 F. 2d 586.

2. Jurisdiction of the Court is invoked on the following grounds:

(A) A Writ of Certiorari is sought to review the questions later presented for these reasons:

(a) The first three questions presented for review vitally affect the safety of lives and ships. These questions concern the application of major rules for safety at sea laid down by this Court in *The Ariadne* (13 Wall. 475; 80 U. S. 542) and *The Pennsylvania* (19 Wall. 125; 86 U. S. 148), which either need reaffirmation or the pronouncement of different concepts if the questioned Opinion is valid.

(b) The next two questions concern direct conflicts between the Circuits as to the scope of review permitted an Appellate Court under the "clearly erroneous" doctrine of *McAllister v. United States* (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999).

(c) The remaining question concerns the basic liability for acts of a pilot. No decision on the subject by this Court exists since *Guy v. Donald* (203 U. S. 399, 27 S. Ct. 63, 51 L. Ed. 245). The decision of the Ninth Circuit in

The President Van Buren (223 F. 2d 853, 1955 A. M. C. 1294), and the instant case, leave the field in a state of hopeless ambiguity.

(B) The Decree sought to be reviewed was rendered April 3, 1961, and entered April 3, 1961. [R. 534, 544.]

(C) An Order was made May 2, 1961 granting Petitioners (Appellants) to and inclusive of May 24, 1961 to file a Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit. Such petition for rehearing was timely filed May 24, 1961 and then denied by the Court on June 2, 1961. [R. 545.]

(D) Jurisdiction of this Court to review the Decree in question by Writ of Certiorari is invoked by the provisions of Title 28 U. S. C. A. 1254(1), and United States Supreme Court Rule 19, Title 28 U. S. C. A. Part V, Rule 19.

Questions Presented for Review

1. May a ship with an improper lookout, a statutory fault, ever be relieved of the burden of proving "* * * not merely that her fault might not have been one of the causes or that it probably was not, but that it cannot have been"? *The Pennsylvania* (19 Wall. 125; 86 U. S. 148).

2. Does a Finding of Fact stating "There was no fault upon the part of DONA AURORA or the agents, servants or employees of libelant which caused or contributed to the grounding", with no evidence to support a stronger finding, present that degree of

proof required by *The Pennsylvania* (19 Wall. 125; 86 U. S. 148)?

3. Is a ship master, his ship in thick fog, who by radar "lookout" observes his ship to be on a collision course, ever excused from failure to warn the pilot, or acting to save his ship? No ground rules by this Court yet exist covering this situation.

4. Did this Court intend the "clearly erroneous" rule in *McAllister v. United States* (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to restrict an Appellate Court's review of a Finding based on evidence by deposition and exhibit?

5. Did this Court intend the "clearly erroneous" rule of *McAllister v. United States* (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to restrict an Appellate Court's review of Conclusions of Law, although labeled Findings, or prevent it from remanding the case for additional Findings, or making its own Findings?

6. May the rule announced by the Ninth Circuit in *The President Van Buren* (223 F. 2d 853, 1955 A. M. C. 1294) be extended into non-pilotage waters and make a municipality liable for the acts of its pilots beyond its boundaries and in waters for which the pilot is not licensed, and waters for which no pilot's license is authorized or obtainable?

Statutes Involved

1. *33 U. S. C. A. Sec. 147a*

> "§ 147a. *Additional precautions generally (Rule 29)*
>
> Nothing in the sections 144-147d of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by special circumstances of the case."

2. Sec. 302.135 Coast Guard Regulations, defining boundary lines of inland waters, promulgated under authority vested in the Commandant of the Coast Guard under Sec. 101 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875, and Sec. 2 of the Act of February 19, 1895, as amended (28 Stat. 672, 33 U. S. C. A. 151), reading as follows:

> "*San Pedro Bay.* A line drawn from Los Angeles Harbor Lighthouse through the axis of the new breakwater and extended in a straight line to the shore of Long Beach.

Statement of the Case

This action was originally filed by Libel in Admiralty in the United States District Court for the Southern District of California, Central Division, by National Development Company, a Philippine Government Corporation, owner of the Philippine Motor Ship

"DONA AURORA", against the City of Long Beach, a Municipal Corporation, Sigurd A. Ongland, pilot, and J. A. Jacobsen & Company, Inc., a Corporation. Jurisdiction in the District Court was based upon 46 U. S. C. A. 740, 28 U. S. C. A. 1333(1) and Const. Art. III Sec. 2.

The following statement resolves all facts on which true Findings were made, in favor of Libelants, National Development Company, a Corporation, *et al.*

On the morning of August 19, 1955, the Philippine M V "DONA AURORA", owned by Libelant, National Development Company, lay in the open sea approximately one mile off the seaward entrance to Long Beach Harbor, California. A port pilot employed by J. A. Jacobsen & Company, Inc., and furnished by the City of Long Beach, federally licensed for "San Pedro Bay and Tributaries" only, had been ordered by the ship.

The pilot boarded the ship where she lay in territorial waters outside the harbor. Fog, patchy to heavy, was present. A discussion was had between pilot and master concerning bringing the ship into Long Beach, the decision being to proceed toward the harbor. At the start of the transit the pilot had walkie-talkie communication with the Long Beach shore-based radar station. The ship's radar was operating. The ship's chief officer and seven of the crew were stationed at the bow of the ship, 250 feet forward of the bridge, and 20 feet lower down; the chief and some of the crew were supposed to be acting as lookouts, and some had other duties [R. 452-454]. The pilot, master, third mate and helmsman were on the ship's bridge. Somewhere during the mile transit the

pilot for reasons unknown lost communication with the shore-based radar and never regained it until after the casualty. By this time the ship was in thick fog. The pilot was relying on the sounds of the large fog horn located at the west end of the breakwater entrance [R. 76, 77, Find. 14(h), Opin. of 9th C.C.A.]. There is a minor horn on the east end, but it is inaudible on a ship's bridge. Each horn is pitched and timed to give a different and distinctive signal. When approximately three-tenths miles from the west end of the breakwater entrance the master took a "long look" at the ship's radar and saw the ship headed directly at the west end of the breakwater [R. 109, 110, 121-125, 128-132, 135, 159]. This was shown by a drawing made by the master of what he saw [Ex. D]. This information was not given the pilot; the Master told the pilot the eastern edge (breakwater) is fast "approaching" or "abeam", and nothing else. The ship struck the west end.

The Chief Officer, whose duty was "lookout" and whose testimony was entirely by deposition, and who was stationed some 20 feet lower and 250 feet forward of the bridge, sighted the lighthouse on the west end of the breakwater and reported it only *after* the pilot had also seen it from the bridge [R. 110, 111, 167]. The Chief Officer thus assigned as lookout testified (all by deposition) that he heard many sounds during the course of the transit, but could not distinguish whether they were fog signals from the lighthouses or ships in the harbor [R. 319]; he reported none of the sounds to the bridge nor did he report to the bridge the direction the sounds bore to him at the bow of the ship [R. 167, 289].

The ship struck the breakwater 15 feet from the west end.

The Trial Court found the Respondent pilot negligent in many particulars, with which we are not now concerned, and do not here dispute.

Negligence on the part of the Captain, the lookout, and various other members of the crew, was urged at both the trial and Appellate levels, as a proximate cause of the casualty. The Lower Court in its first Opinion found that those stationed as lookouts did not discharge the duties of lookouts [R. 45], and that this was a proximate cause of the collision. In its second Opinion the Lower Court still found that the lookout's performance was questionable [R. 53], but found sole fault on the Respondents. However, the only formal Finding made by the Trial Court concerning the acts and omissions of the ship, the Master, the lookout, and other ship's personnel was Finding No. 17:

> "17. There was no fault on the part of Dona Aurora or the agents, servants or employees of libelant which caused or contributed to the grounding" [R. 77].

The pilot, the contractor, and the City were found solely at fault for the casualty.

The Circuit Court affirmed the decision holding Finding No. 17 by the Trial Court to be not clearly erroneous under *McAllister v. United States*, 384 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1989.

ARGUMENT

1. May a Ship With an Improper Lookout, a Statutory Fault, Ever Be Relieved of the Burden of Proving "* * * Not Merely That Her Fault Might Not Have Been One of the Causes or That It Probably Was Not, but That It Cannot Have Been"? The Pennsylvania (19 Wall. 125, 86 U. S. 148)

The performance by a ship of the duties imposed by statute was considered of such paramount importance to the safety of lives and property at sea that this Court in *The Pennsylvania* established the basic rule:

> "In such case (a statutory fault upon the part of the vessel) the burden rests upon the ship of showing not merely that her fault might not have been one of the causes or that it probably was not, but that it cannot have been" (matter in parenthesis ours).

In the case before the Court the undisputed facts (all by deposition) show the lookout was not a proper lookout; he had other duties; he did not report fog signals he heard, or how they bore to him. Such conduct amounts to a statutory fault (*The Koyei Maru*, 96 F. 2d 652, 654). Not only does the evidence show the lookout's dereliction beyond doubt, but it is noted by the Trial Court in both of its written Opinions [R. 42, 50]. It is uncontroverted that the pilot (after losing radio communication) navigated by sound and heard what he thought was the lighthouse on the west end of the breakwater on his port hand [R. 428, 9th C. C. A. Opinion]. It is admitted fog plays tricks with sound [R. 505, 9th C. C. A. Opinion]. Who can say what the pilot might have done to save the ship had he been informed by the lookout

of the sounds he heard as he heard them, and how they bore to him at the bow of the vessel 250 feet forward of the pilot on the bridge, and 20 feet lower to the water? It is not the duty of Petitioners to prove that reports of the lookout would have prevented the collision, but it is the burden of the Libelants to prove that the failure of the lookout to report *could* not have contributed to the casualty. There is no evidence to support the statement in the Ninth Circuit's Opinion that it did not matter whether the lookout reported what he heard. Such statement by the Court is a conclusion unsupported by any evidence whatsoever.

In this day of ever crowded sea lanes, and increased speed of ships, it is imperative that this Court grant a review and reaffirm the rule of *The Pennsylvania*. Without such reaffirmation, at least in pilot cases, municipal pilotage is doomed. A pilot and his municipal employer must be able to place some reliance on the ship's proper performance of its duties, otherwise the burden is too great and municipal pilotage, with its attendant convenience and contribution to safety of lives and property must be abandoned. This is so because the pilot is but one man. He cannot be master, mate, lookout and ergineer, nor may he school or discipline them. He must accept the help the ship provides; responsibility for the ship's personnel must remain solely with the master.

The Brenta II (Libera Triestina S. A.) 32 F. 2d 209, 210 (Cert. denied 280 U. S. 571, 74 L. Ed. 626);

The City of Dundee, 108 Fed. 679;

The Manchioneal, 243 Fed. 801, 806;

Wilson v. Charleston Pilots Assn., 57 Fed. 227.

2. **Does a Finding of Fact Stating "There Was No Fault Upon the Part of DONA AURORA or the Agents, Servants or Employees of Libelant Which Caused or Contributed to the Grounding," With No Evidence to Support a Stronger Finding, Present That Degree of Proof Required by The Pennsylvania (19 Wall. 125, 86 U. S. 148)?**

The purported Finding of Fact No. 17 quoted in the question, *supra*, is the only Finding made which bears on the culpability of the ship and crew. It is submitted that by its very language it avoids meeting the burden of proof made mandatory by *The Pennsylvania*. The identical situation arose in the Fourth Circuit case of,

> *The Fort Fetterman v. The South Carolina State Highway Department* (4th Cir., 261 F. 2d 563),

where that Court, at page 565, in discussing the District Court's decision of sole fault, agreed that the Finding should not be disturbed unless clearly erroneous, but at pages 567 to 569, the Circuit Court reversed the sole fault decision on the ground that *The Pennsylvania* Rule applied and the District Court was in error in concluding the Appellee had met the burden imposed by law.

It is earnestly requested that this Court review Finding No. 17 in the light of the uncontroverted evidence (all by deposition) and determine whether the burden of *The Pennsylvania* has here been met.

3. Is a Ship Master, His Ship in Thick Fog, Who by Radar "Lookout" Observes His Ship to Be on a Collision Course, Ever Excused From Failure to Warn the Pilot, or Acting to Save His Ship? No Ground Rules by This Court Yet Exist Covering This Situation

Radar is the most effective anti-collision device known to man; it is another "lookout" with eyes able to penetrate the thickest fog, an aid to navigation completely unknown in the days of *The Ariadne* (13 Wall. 475; 80 U. S. 542) and *The Pennsylvania* (19 Wall 125; 86 U. S. 148), or when Rule 29, Title 33 U. S. C. A. 147a was drafted. Had there been radar in the days of *The Ariadne*, which held,

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. * * * It is the duty of all Courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application."

or in the day of *The Pennsylvania*, can anyone doubt radar would have been included along with the conventional lookout in the rule laid down by those cases and the Statute?

To adequately appreciate the gravity of the question as related to the case before the Court, we review in substance the Master's testimony:

> Captain Baura testified that at one time during the transit of the ship from the open sea to the breakwater he took "one long look" at his radar. On Exhibit D he *drew* what he saw. Exhibit D shows by the concentric rings in the

> inner azimuth of the radar that the ship (at the time he took his long look) was precisely three-tenths and nineteen-hundreds miles from the west end of the breakwater, and the radar screen showed by the heading flasher that the ship was on a direct collision course with the west end of the Long Beach Breakwater where she struck. At the time of the Coast Guard Hearing, a few days after the collision, Captain Baura stated he thought his ship was in danger when he took his long look at the radar [R. 128-129]. On trial, years later, he stated flatly that his ship was not in danger [R. 127]:

The Ninth Circuit Court of Appeals chose to accept the latter testimony (Opinion); what the Trial Court believed is unknown, as no Findings were made on the subject of Baura's negligence, nor was Exhibit D referred to in either of the Trial Court's Two Opinions, or the Opinion of the Ninth Circuit Court of Appeals. Regardless of what the Trial Court thought or what the Circuit Court adopted, the silent evidence of Exhibit D cannot be refuted; the ship was in danger.

Captain Baura remained wholly silent as to what he saw on the radar, telling the pilot only that the "eastern edge of the breakwater was fast approaching", or "abeam", which meant nothing to the pilot without a knowledge of the ship's heading in relation to the entrance. Has a captain in such a situation the right to stand silent while his ship rides into the jaws of danger, or must he speak or act? What he did or omitted to do in this case is as negligent as would have been the look-out at the bow, had he at the same time as the Captain's "long look" seen the lighthouse

or the breakwater dead ahead, and failed to alert the bridge. Surely, had the Captain seen it with his own eyes instead of with the eyes of radar, and remained silent, no one would have questioned the fact of his gross negligence. See

Pennsylvania Railroad Company v. The Beatrice (2d C. C. A.), 225 F. 2d 209, at 212.

Nor does the claim that the pilot was compulsory excuse the master from acting (*Jure v. United Fruit Co.*, 6 F. 2d 6, 7). How strict the rule is enforced is shown in *Charente Co. v. United States*, 12 F. 2d 412.

Does the fact that the Captain observed what he saw by radar excuse him from the duty that would have been his under conventional circumstances? Judge Medina, speaking for the Court in *Bergechief-Burgan (Appeal)*, 2 C. C. A., 274 F. 2d 469, 475, 1960 A. M. C. 1380, 1387, emphatically says, NO!

> "A master has no more discretion to disregard this aid to navigation than he has to disregard the use of charts, current tables and soundings where the circumstances require the use thereof. The real question on this phase of the case is, would the radar have provided information of such a character as to have made it clear to the *Bergechief* that she should have reversed her engines and stopped her headway of some five knots sooner than she did."

No pronouncement has been made by this Court on the subject of radar-lookout, and the obligations arising from its use. Having now been used commercially for almost 20 years it appears imperative for

this Court to end confusion by appropriate instructions to the Circuits and to seamen regarding the use of this device.

4. Did This Court Intend the "Clearly Erroneous" Rule in McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to Restrict an Appellate Court's Review of a Finding Based on Evidence by Deposition and Exhibit?

This case points up the conflict between the Second and the Fourth Circuits on the one hand, and the Ninth Circuit on the other, concerning the scope of review of Findings where evidence is by deposition and exhibit. Finding No. 17 is supported, if at all, almost entirely by deposition of the lookout and Exhibit D drawn by Captain Baura. The Ninth Circuit, however, in its Opinion, made no distinction between its power to review such evidence and evidence given orally.

The Second Circuit, in

Bertel v. Panama Transport Co., 202 F. 2d 247, at 249,

states its rule as follows:

> "* * * Since all of the evidence was documentary or by deposition and the trial-judge did not hear or see the witnesses, we are in as good a position as the lower court to evaluate it. Although under these circumstances the 'clearly erroneous' doctrine is not applicable, Panama Transport Co. v. The Maravi, 2 Cir., 165 F. 2d 719; Stockes v. United States, 2 Cir., 144 F. 2d 82 * * *"

The rule set out in the foregoing case is variously expressed and followed in

Irazani Mettoghi v. Barkey Importing Co. (2d Cir.), 244 F. 2d 238, at 248;

Hellenic Lines Limited v. Brown & Williamson Tobacco Corporation (4th Cir.), 277 F. 2d 9, at 13, Footnote 5;

Spanos v. The Lily (4th Cir.), 261 F. 2d 214.

This conflict among the Circuits stems from divergent interpretations of the "clearly erroneous" rule in *McAllister v. United States* (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999). In the interests of the administration of equal and substantial justice throughout all Circuits of the United States, we request that the Court clarify the *McAllister* Decision concerning the right of the Appellate Court to reach Findings different from that of the Trial Court, though not "clearly erroneous", when based on evidence by deposition and exhibit.

5. **Did This Court Intend the "Clearly Erroneous" Rule of McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to Restrict an Appellate Court's Review of Conclusions of Law, Although Labeled Findings, or Prevent It From Remanding the Case for Additional Findings, or Making Its Own Findings?**

Again there exists a sharp conflict between the Second Circuit, the Third Circuit and the Ninth Circuit as to the breadth of review where Findings are not specific, in accord with General Admiralty Rule 46½, and constitute a Conclusion of Law. The Second Circuit states in

The Black Gull (2d Cir.), 269 F. 2d 68, at 70,

that a Finding involving negligence is a Conclusion of Law and it is a Court's duty to review, and if necessary (as it did) remand the case for further Findings on negligence, and if further Findings are not forthcoming, then to make their own Findings. In *The Black Gull* the Second Circuit proceeded to make its own Findings on the second time the case was before it.

The Third Circuit in

Mesle v. Kea S.S. Corp., 260 F. 2d 747, at 750, 1961 A. M. C. 466, at 469

states:

> "The trial judge adopted the libellant's proposed findings of fact and conclusions of law, a practice which the court had disapproved on another occasion as being an inadequate compliance with Admiralty Rule 46½, 28 U. S. Code. We have in mind the edict in *McAllister v. United States* (1954), 348 U. S. 19, 1954 A. M. C. 1999, that a judgment in admiralty is not to be set aside unless it is clearly erroneous. And yet where the court has not independently set out its findings, we think the reviewing court may more readily be * * * 'left with a definite and firm conviction that a mistake has been committed.'"

The Ninth Circuit, in

Pacific Towboat Company v. States Marine Corportation of Delaware, 270 F. 2d 745, at 752,

states that it is mindful of the cleavage between it and the Second Circuit, but believes itself bound by the "clearly erroneous" rule of *McAllister*, as does that Court in the instant case. Which Court is correct?

Here Finding No. 17 is the only Finding made by the Trial Court bearing upon the conduct of the vessel and crew. It makes no specific finding on negligence or the absence of negligence on the part of the vessel or any member of the crew; however, as in *The Black Gull, supra*, the Trial Court apparently assumed some negligence; therefore, the Finding becomes at best a conclusion as to proximate cause without any facts found on which to bottom it. In a similar situation in *The Black Gull* the Appellate Court made its own Findings on negligence and as a result found the Trial Court's Finding on proximate cause "clearly erroneous".

Here the evidence clearly shows that the lookout was not properly functioning, which under General Admiralty Rule 46½, *The Black Gull, Mesle v. Kea S.S. Corp.*, and our belief of the meaning of *McAllister*, requires a Finding of negligence. Such a Finding alone might not constitute Finding No. 17 "clearly erroneous" in the opinion of the Appellate Court; but when coupled with the fact that the lookout's negligence was a statutory fault, it would have shown Finding No. 17 to be "clearly erroneous", the exact situation and result in *The Fort Fetterman* case.

Much the same situation as existed with the lookout is true of the Captain's acts and omissions upon which a specific finding of negligence should have been made. Had such a finding been made by either the Trial or Appellate Court, it would have been exceedingly difficult, if not impossible, to have found Finding No. 17 "not clearly erroneous".

Petitioners believe the rule in *McAllister* was not intended to cover a Trial Court's mistakes with a cloak of

sanctity, forbidding the Reviewing Court power to find or require findings where they should have been made but were not, or to review in its entirety a Finding essentially a conclusion of law. Again, for the sake of uniformity in admiralty practice, a review of the application of *McAllister* is deserved.

6. **May the Rule Announced by the Ninth Circuit in The President Van Buren (223 F. 2d 853, 1955 A. M. C. 1294) Be Extended Into Non-Pilotage Waters and Make a Municipality Liable for the Acts of Its Pilots Beyond Its Boundaries and in Waters for Which the Pilot Is Not Licensed, and Waters for Which No Pilot's License Is Authorized or Obtainable?**

This Decision, the Decision of the Ninth Circuit in *The President Van Buren* (223 F. 2d 853, 1955 A. M. C. 1294), and the Decision of the Ninth Circuit in the *City of Los Angeles v. Standard Trans. Co.* (32 F. 2d 988), leave in utter confusion the basic responsibility for the acts of pilots, and where, if ever, that responsibility terminates.

In the only decision of this Court, that we can find, bearing on the subject,

> *Guy v. Donald*, 203 U. S. 399, 27 S. Ct. 63, 51 L. Ed 245 (See Gilmore & Black, The Law of Admiralty, page 430),

Justice Holmes found a Pilot Association not responsible for the acts of pilot members while aboard ship and beyond control of the Association. The Ninth Circuit in *City of Los Angeles v. Standard Trans. Co.*, 32 F. 2d 988, applied the same rule to a municipal employer of pilots. In *The President Van Buren* (223 F.

2d 853, 1955 A. M. C. 1294), the Ninth Circuit held the municipality liable for the acts of its pilot while aboard ship, the only presumable difference being that by stipulation the Court in *The President Van Buren* found the municipal pilot to be a compulsory pilot. The only decisions of this Court (known to us) dealing with the subject of when pilotage is compulsory are

The China, 7 Wall. 53; 74 U. S. 67,

The Merrimac, 14 Wall. 199; 81 U. S. 873,

wherein the Court held that a state requirement that a pilot be taken, or a fee paid, was not compulsory pilotage, compulsory pilotage being only when a pilot must be taken by law and a penalty, other than payment of a fee, is provided. In our case the portions of the Tariff of the City of Long Beach applicable to pilotage [Ex. F] does not compel the use of a municipal pilot; any federally licensed pilot may be used provided Long Beach is paid a fee. If then, the Respondent Ougland was not a compulsory pilot, the Ninth Circuit's decision in both *The President Van Buren* (223 F. 2d 853, 1955 A. M. C. 1294) and the instant case is contrary to this Court's Decision in *Guy v. Donald* (203 U. S. 399, 27 S. Ct. 63, 51 L. Ed. 245).

> "* * * Some statutes, however, allow the ship to refuse the pilot provided she pays his fee or half of it ("'half-pilotage"'). The Supreme Court had indicated that it does not regard the tendering of this alternative as amounting to compulsion." (Gilmore & Black, The Law of Admiralty, page 429.)

The President Van Buren (223 F. 2d 853, 1955 A. M. C. 1294), however, goes even further and holds the City of Long Beach liable for the acts of its pilot

after the ship had passed into the waters of Los Angeles Harbor (the two harbors are interconnecting and make up San Pedro Bay and its Tributaries, for which local pilots are federally licensed). The fact that Long Beach would have no power to compel a ship in Los Angeles waters to have a Long Beach pilot caused the Court no concern. The Court dismissed this legal anomaly by stating the shift began in Long Beach and Long Beach received the fee for the entire transit. While we agree that it might be inconvenient to change pilots at the imaginery dividing line between harbors, we believe the legal result achieved by the ruling to be wholly untenable, contrary to previous decisions of the Ninth Circuit, and this Court.

The law of the instant case extends the rationale of *The President Van Buren* to waters beyond the jurisdiction of any municipality, and into waters for which the pilot did not have a license and for which no pilot's license is obtainable from any source. The pilot held a license for San Pedro Bay and Tributaries. The collision here occurred on a foreign flag vessel in territorial waters outside of San Pedro Bay, as defined by the Commandant of the United States Coast Guard (C. G. Regulations 302.135, Sec. 101 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875), and Sec. 2 of the Act of Feb. 19, 1895, as amended (28 Stat. 672, 33 U. S. C. 151)). No pilot's license can be granted for such waters, and the City of Long Beach cannot compel a ship to take a pilot in territorial waters. That the pilot boarded the vessel where he did was purely for convenience of all concerned. If he acted as a pilot, though no license existed, he acted without the scope of any authority given or held by Long Beach. That this Court recognizes a difference

between pilotage waters and non-pilotage waters was announced in,

The Hope, 35 U. S. (10 Pet.) 108, 117, 119.

Even if the questioned decision be upheld in result, it establishes no territorial limits beyond which a municipality is not responsible. A Long Beach municipal pilot could board a ship anywhere in the vast reaches of the Pacific Ocean, and as long as the ship was destined for Long Beach as its next port of call, Long Beach would be liable for the acts of the pilot while assisting. Yet, by law the boundaries of inland waters are fixed with precision. (See Gilmore & Black, The Law of Admiralty, page 400, Title 33 U. S. C. A. 151, and Sec. 302.135 Coast Guard Regulations, defining San Pedro Bay).

To aid what is left of American shipping and give guidance to municipalities attempting to render an irreplaceable service for the safety of life, property and ships in busy harbors, a review of the law is imperative. Pilots and seaboard municipalities are deserving of rules with which they may live. As of now, if this decision stands, municipally provided pilotage is doomed.

Conclusion

Here the Trial Court and the Circuit have in effect said:

1. A "lookout" or any other ship's officer may choose what he shall report, and if no report is made the pilot is charged with that failure.

2. The master of the vessel may observe by radar in thick fog, see apparent danger, and need

not tell the pilot, unless the pilot specifically asks complete information.

3. The burden of proving that statutory fault of the ship could not have contributed to a casualty no longer rests upon the ship and owners, contrary to *The Ariadne* and *The Pennsylvania*.

4. Findings of negligence, though present, may be dispensed with, a conclusion of law called a finding substituted, and the Circuit is powerless to review.

5. A municipality maintaining a pilotage service, through the acts of its pilot aboard a foreign vessel in waters beyond its jurisdiction, and for which no license is obtainable, is an insurer of the safety of the ship.

It is submitted no one of these pronouncements is the law, and all are in conflict with previous decisions of this Court.

Respectfully submitted,

ARCH E. EKDALE,
Proctor of Record,

GORDON P. SHALLENBERGER,
WAHLFRED JACOBSON,
City Attorney for the City of Long Beach, a municipal corporation,

Of Counsel.

APPENDIX.

Opinion of United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit.

City of Long Beach, a municipal corporation, Sigurd A. Ougland and J. A. Jacobsen & Company, Inc., a corporation, Appellants, v. National Development Company, a corporation, et al., Appellees. No. 16,930. April 3, 1961.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Hamlin and Merrill, Circuit Judges. Hamlin, Circuit Judge.

The National Development Company, appellee herein, is a Philippine corporation and the owner of the Philippine motorship Dona Aurora. It filed a libel in the United States District Court for the Southern District of California, Central Division, against the City of Long Beach, a municipal corporation, J. A. Jacobsen & Co., Inc., a corporation, and Sigurd A. Ougland, appellants herein, for damages sustained by the Dona Aurora by reason of her collision on August 29, 1955, with the outer breakwater at the entrance of Long Beach Harbor, California. Subsequent to the filing of the libel, certain insurers of cargo were, by the order of the district court, admitted to prosecute the cause as co-libellants. Sigurd A. Ougland was a municipal port pilot for the City of Long Beach and was the agent and servant of J. A. Jacobsen & Co., Inc., and the City of Long Beach. At the time of the collision he was

acting within the scope and course of his duties. Following a trial before the court, the district judge found that Ougland was careless and negligent in navigating the Dona Aurora; that through his negligence the ship collided with the breakwater; and that there was no fault on the part of the Dona Aurora or her agents, servants or employees which in any way caused or contributed to the collision. The judge thereafter rendered judgment in favor of the appellees. Appellants timely filed an appeal to this court from said judgment. Jurisdiction in the district court was based upon 46 U. S. C. A. § 740, 28 U. S. C. A. § 1333(1), and Const. Art. III § 2. Jurisdiction in this court is based upon 28 U. S. C. A. § 1292(3).

The entrance to Long Beach Harbor is a 1000-foot opening in a breakwater which runs generally in an east-west direction. There is a lighthouse on the eastern edge of the opening and another smaller lighthouse on the western edge of the opening. It is the unsuccessful attempt of the Dona Aurora to pass through this 1000-foot opening that is the subject of this appeal.

From the evidence and the findings of the district court certain salient facts are established. During the early morning of August 29, 1955, the master of the Dona Aurora, Captain Baura, requested the services of a pilot in order that he might enter Long Beach Harbor. When the ship arrived outside the harbor, shortly before 7 A.M., the pilot boat was not in view, so Captain Baura waited near the entrance buoy. At about 7 A.M. Captain Ougland, a Long Beach municipal port pilot, boarded the Long Beach pilot boat and started out to the Dona Aurora. Between the pilot

station and the breakwater entrance the pilot boat encountered fog, and in accordance with his previous standing orders, Captain Ougland arranged to have Captain Jacobsen summoned to the pilot station on shore so that the shore based radar would be operating if it should be needed. Some time after seven o'clock the pilot boarded the Dona Aurora. On four prior occasions he had acted as pilot when the Dona Aurora entered Long Beach Harbor, and on nine prior occasions Captain Baura had been the master of the Dona Aurora when the ship entered Long Beach Harbor. The master testified to the meeting as follows:

"We greeted in the usual manner, and at that moment I asked him if we can safely enter the Long Beach Harbor . .

"So, he said, 'We can enter.' As usual he had been entering the ship in the same manner, when he came before, there was no different manner in which he came in, but this time he had slung on his shoulder a walkie-talkie, a Motorola walkie-talkie, and he told me . . . 'Yes, we can with this.' "

The District Court found that the pilot assumed the conn of the ship, thereafter gave all course and engine orders and was in charge of the navigation and movement of the ship until it grounded on the Long Beach breakwater some fifteen minutes later.

When the pilot first came aboard, he was in contact with the radar station on shore by means of his walkie-talkie radio. However, shortly thereafter, for some unascertained reason, the walkie-talkie set became inoperative and remained so until after the ship struck the breakwater. The pilot testified that he tried repeatedly

to make contact with the pilot station on shore but that he did not get any answer. The evidence conflicts as to whether the pilot gave this information to the master of the ship. The district court, however, found that this interruption was known to the appellants, but was not known to the master of the ship. The pilot testified that when he boarded the ship there was very limited visibility and that he did not give any instructions to the captain of the pilot boat to stand by. The pilot had experienced walkie-talkie transmission failures "two or three times" previously and had been informed by other Long Beach pilots that they had had trouble also. There was evidence that all of the Long Beach pilots had been instructed in the use of the radar equipment with reference to the problems that might be encountered. Certain operation instructions had been prepared, including Rule 12, which reads as follows:

"If there should be any interruption of communication with the station at any time during operations, the boat or vessel he is aboard is to be stopped until contact has been resumed."

Ougland did not act in accordance with this instruction.

When the pilot assumed the conn of the vessel he neither asked for nor received a fix on the vessel's position from the shore-based radar operator, the ship's radar, nor any other source. He did contact the shore-based radar station and obtain two bearings from the ship to the breakwater entrance, 320° to the lighthouse on the end of the breakwater on the west side of the entrance and 330° to the center of the entrance. At the time these bearings were obtained the ship had a

heading of 40° true. At this time, however, the pilot had not seen the entrance buoy which is located exactly one mile due south from the middle of the entrance and had not obtained exact information as to the position of the ship. There was a conflict of testimony between the pilot and the helmsman as to what course was followed. According to the pilot, he first gave a course of 320° and later gave a course of 330°. According to the helmsman, he was given a course of 325° which he acknowledged to the pilot.

The vessel proceeded through the patch fog at a speed of two to three knots.

There was a radar device on the bridge which was accessible to both the master and the pilot. The pilot admitted that he did not direct the master to plot the course or position of the ship or to provide him with any particular information, but there is a conflict in the testimony as to just what did occur concerning the radar. The master testified that he looked casually at the radar on more than one occasion, but that only once did he stay long enough to get any useful information. The pilot testified that on two or three occasions he said to the master, "How does she look," to which the master replied, "She looks fine." The pilot said that he himself looked at the radar on two or three occasions, only to observe that it was working properly, but that he did not stay long enough to observe any detail.

The pilot testified that he intended to take the ship close to the western end of the entrance to the harbor and to then change the course to go through the opening. He admitted that he knew that if he had started from the entrance buoy one mile south of the middle

of the entrance of the breakwater and had then steered a course of 300 degrees, the ship would have travelled through the middle of the entrance and that there would have been more margin for error in such a course. It was his choice to take the ship upon a course that would bring it close to the western end of the entrance.[1]

During the period when the pilot had the conn of the ship there were varying conditions of visibility. He knew that the fog was thick at the entrance to the harbor, for he had just passed through that area while in the pilot boat on the way to the Dona Aurora. During none of the time, with the exception of the first two or three minutes, did the pilot have radio contact with the shore radar station. At no time did he attempt to contact the shore radar station through the apparatus on the pilot boat, and at no time did the shore station attempt to contact the ship through the

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[1]Captain Ougland testified as follows:

Q. When you come in at an angle either way, you cut down the margin of error space that is present?

A. That is correct.

Q. That is correct, is it not?

A. Right.

Q. Now, in a heavy fog, then, you made a deliberate decision to not go in directly but to come in on an angle, is that correct?

A. I come in purposely on that course favoring the west side because that is the only horn that you can hear from the ship up on the bridge.

* * * * *

Q. At the time you made the course change to 330, you said you deliberately intended not to go straight in. You intended to go on this course that would bring you close to the west side, is that right?

A. That is correct, up to a point where we squared off. In other words, I am bringing her to the westward and depending on getting information, which I didn't get, from the captain, and I proceeded.

apparatus on the pilot boat although it is undisputed that the shore station was in contact with the pilot boat

As the ship was proceeding through the patchy fog the pilot observed a heavy fog bank ahead and put the engines on "dead slow ahead." About a minute and a half later he stopped both engines. One minute later he ordered hard right rudder. Shortly thereafter he saw the "lighthouse coming out of the fog" and he threw the telegraph "full astern." However the ship hit the rocks of the breakwater below the water line.

The district court found that the pilot was guilty of "negligence of a most palpable kind, proximately causing and contributing to the grounding." He found that—

(a) He failed to determine the position of the Dona Aurora at the time he assumed the conn of the vessel or at any time until the vessel grounded on the Long Beach breakwater.

(b) He set the vessel on a collision course.

(c) He chose the most dangerous of alternative courses to the breakwater entrance under conditions of minimal visibility and knowing he was without contact with the Long Beach shore-based radar.

(d) He failed to use alternate available means of contacting the Long Beach shore-based radar by radio relay through the Long Beach Pilot Boat.

(e) He failed to stop the vessel when he lost contact with the Long Beach shore-based radar station.

(f) He failed to make the vessel's master and crew aware of his lack of communication with the Long Beach shore-based radar station, while he gave the impression he had such contact.

(g) He failed to employ the ship's radar properly in the navigation of the vessel.

(h) He relied upon navigating by sound, heading and directing the vessel towards the west side of the breakwater entrance so he could hear the fog horn on the bridge and using sounds of the fog signal on the west side of the breakwater entrance to determine the safety of his course, knowing that sounds in fog often "play tricks" and that their origin may not be where it seems to be.

The scope of this court's power to review is set out in McAllister v. United States, 348 U. S. 19, 20 (1954). The Supreme Court there said:

"In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .'" [Citations omitted]

We hold that the findings of the district court were not clearly erroneous.

In addition to denying negligence upon their part, appellants contend that the cause of the accident was the negligence of the appellee in that (1) the master of the ship saw on the radar screen that the ship was heading toward the breakwater and did not so advise the pilot; (2) that the ship failed to maintain a proper

lookout; and (3) that the lookout failed to advise the bridge promptly of what was heard and seen.

At the time that the master took a "long look" at the radar screen, the ship was on a diagonal course and was closer to the eastern edge of the breakwater entrance than to the western edge. However, that is the course the pilot chose to take in order that the vessel would come close to the fog horn of the lighthouse. The master testified that he told the pilot the easterly edge of the entrance was "fast approaching" and the pilot replied, "Yes." "So I thought everything was all right." When the master was asked under what circumstances he would take the conn of the ship from the pilot, he testified as follows:

Q. "Can you think of any other circumstances arising where you would take the conn of the ship away from him?"

A. "When the ship is standing in danger, I will take the ship."

Q. "You knew your ship was standing in danger when you looked in the radar, didn't you?"

A: "No."

While the testimony of the master as to where the ship was when he made the above observation of the radar or how long this occurred before the grounding of the ship is not entirely satisfactory, we cannot say that it requires a finding of negligence upon his part.

Appellants also contend that the ship failed to maintain a proper lookout, and that this was a proximate cause of the grounding. The evidence shows that it was approximately 200 feet from the bridge of the ship to the bow and that the bridge was approximately

twenty feet higher than the bow. Appellant contends that from a position on the bow a lookout should have seen the lighthouse before it was seen by the pilot, and that if it had been seen and reported to the bridge the pilot would have had an opportunity to change the course of the vessel and miss the edge of the breakwater. Appellants also complain of the fact that the lookout did not report to the bridge the fact that "lots" of fog horn signals were heard.[2]

The pilot, however, being familiar with local conditions, testified that he heard the fog horn blowing on the westerly side of the entrance to the harbor, and the small fog horn blowing upon the easterly side thereof. He also testified that at the time he entered the fog bank he heard the fog signal on the lighthouse and that at that time "it appeared to be on the port bow, well on the port bow."[3] It must be remembered

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[2]Chief Officer Zablan, a resident of the Philippines, testified as follows:

Q. "Can you describe the fog signals that you heard?"
A: "We heard some ships around, and I figure the ships are inside the harbor."
Q: "Did you hear the fog horn on the ends of the breakwater?"
A: "Fog horn? I cannot distinguish the fog horn."
Q: "In other words, you heard fog signals, but you couldn't determine whether they were ships or the fog signals on the end of the breakwater, is that correct?"
A: "That's right."

[3]That the pilot was in error as to the location of this signal is explained by the testimony of Captain Jacobsen that under fog conditions sounds often "play tricks." He explained that in fog often a sound from a fog horn would appear to come from one direction while actually it came from a different direction.

that this is a grounding case, not a collision case, and that the vital signals for the pilot to be aware of were those signals coming from the lighthouses on each end of the entrance to the harbor. It appears from the pilot's own testimony that he was aware of and was able to distinguish between the signals of the two lighthouses, and therefore the failure of the lookout to report "lots" of fog horn signals which he was unable to definitely locate or identify would in no way be material.

It was shown by appellees that the chief officer was properly positioned in the extreme forward end of the vessel, that some other seamen were also in that location, and that some of these men were also acting as lookouts. The chief officer testified that he reported the lighthouse as soon as it could be seen from his position on the extreme forward forecastle and that he was maintaining an attentive forward lookout at that time. The chief officer further testified that it was less than a half minute from the time he reported seeing the lighthouse until the ship hit the breakwater. He further testified that at that time there was a uniform fog, that he was unable to state the exact distance of the visibility,—"it was too foggy."

In a written report made by the pilot to the United States Coast Guard a day or two after the accident, he made no complaint of any failure of a proper lookout. In fact, he stated that "[d]uring all of the time in question the ship maintained a lookout on the bow and continuously sounded fog signals."

The district judge, after a consideration of the contentions made by the appellants, made the following finding:

17. There was no fault upon the part of Dona Aurora or the agents, servants or employees of libellant which caused or contributed to the grounding.

From an examination of the record, we are unable to say that such a finding was clearly erroneous. We have examined other contentions of appellants and find no merit in them.

The judgment is affirmed.

(Endorsed) Opinion Filed April 3, 1961.

Frank H. Schmid, Clerk.

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
SEP 23 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 367

CITY OF LONG BEACH, a municipal corporation, SIGURD A. OUGLAND, and J. A. JACOBSEN & COMPANY, INC., a corporation,

Petitioners,

vs.

NATIONAL DEVELOPMENT COMPANY, a corporation, *et al.,*

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM A. C. ROETHKE,
634 South Spring Street,
Los Angeles 14, California,
Attorney for Respondent, National Development Company.

Of Counsel:
LILLICK, GEARY, MCHOSE,
ROETHKE & MYERS,
KENNETH E. KULZICK.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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1. "May a ship with an improper lookout, a statutory fault, ever be relieved of the burden of proving '* * * not merely that her fault might not have been one of the causes or that it probably was not, but that it cannot have been'? The Pennsylvania (19 Wall. 125, 86 U. S. 148)" 6

2. "Does a finding of fact stating, 'There was no fault upon the part of DONA AURORA or the agents, servants or employees of libelant which caused or contributed to the grounding,' with no evidence to support a stronger finding, present that degree of proof required by The Pennsylvania (19 Wall. 125, 86 U. S. 148)?" 8

3. "Is a ship master, his ship in thick fog, who by radar 'lookout' observes his ship to be on a collision course, ever excused from failure to warn the pilot, or acting to save his ship? No ground rules by this court yet exist covering this situation" 9

4. "Did this court intend the 'clearly erroneous' rule in McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to restrict an appellate court's review of a finding based on evidence by deposition and exhibit?" 10

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5. "Did this court intend the 'clearly erroneous' rule of McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to restrict an appellate court's review of conclusions of law, although labeled findings, or prevent it from remanding the case for additional findings, or making its own findings?" 11

6. "May the rule announced by the Ninth Circuit in The President Van Buren (223 F. 2d 853, 1955 A. M. C. 1294) be extended into non-pilotage waters and make a municipality liable for the acts of its pilots beyond its boundaries and in waters for which the pilot is not licensed, and waters for which no pilot's license is authorized or obtainable?" 12

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IN THE

Supreme Court of the United States

October Term 1961

No. .....

City of Long Beach, a municipal corporation, Sigurd A. Ougland, and J. A. Jacobsen & Company, Inc., a corporation,

Petitioners,

vs.

National Development Company, a corporation, *et al.,*

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This brief in opposition to the Petition for Writ of Certiorari is undertaken because Petitioners have failed to present an accurate summary of the facts as found by the trial court and reviewed by the Court of Appeals for the Ninth Circuit. Rather, Petitioners have presented several general and largely undisputed propositions of law, misapplied to partial, over-simplified, and often misstated, "facts". The many signif-

icant omissions of fact leave a distorted picture, from which errors in application of law can readily be created. If the facts are truly presented, as they were considered by the courts below, there are no significant legal questions for this Court to consider. Perhaps most critically, Petitioners have misconstrued even the Findings of Fact of the trial court and have also failed to present an accurate picture of the review by the Court of Appeals in affirming the trial court's judgment.

Statement of the Case.

Petitioners begin their purported factual summary with the following statement (Pet. Br. p. 6):

> "The following statement resolves all facts on which true Findings were made, in favor of libelants, National Development Company, a corporation, et al."

This proclamation is demonstrably false. Its falsity can be seen in any fair comparison between the Findings of Fact, as reviewed by the Court of Appeals, and Petitioners' statement. They bear little resemblance in real substance.

Petitioners begin their purported statement with an inadvertent error as to the date of the event—it was August 29, 1955, not August 19—and proceed to select such few facts as do not indicate the actions of Long Beach Municipal Port Pilot Ougland, and the impressions which Pilot Ougland created concerning his activities.

For example, Petitioners state (Pet. Br. p. 6):

> "On the morning of August 19, 1955, (*sic*) the Philippine M/V 'DONA AURORA', owned

by Libelant, National Development Company, lay in the open sea approximately one mile off the seaward entrance to Long Beach Harbor, California. A port pilot employed by J. A. Jacobsen & Company, Inc., and furnished by the City of Long Beach, federally licensed for 'San Pedro Bay and Tributaries' only, had been ordered by the ship.

"The pilot boarded the ship where she lay in territorial waters outside the harbor. Fog, patchy to heavy, was present."

By way of contrast, as stated by Circuit Judge Hamlin, speaking for a unanimous Court of Appeals (Appendix, Opinion of the Ninth Circuit, pp. 2 and 3):

"From the evidence and the findings of the district court certain salient facts are established. During the early morning of August 29, 1955, the master of the DONA AURORA, Captain Baura, requested the services of a pilot in order that he might enter Long Beach Harbor. When the ship arrived outside the harbor, shortly before 7 a.m., the pilot boat was not in view, so Captain Baura waited near the entrance buoy. At about 7 a.m. *Captain Ougland, a Long Beach municipal port pilot*, boarded the Long Beach pilot boat and started out to the DONA AURORA. Between the pilot station and the breakwater entrance the pilot boat encountered fog, and in accordance with his previous standing orders, *Captain Ougland arranged to have Captain Jacobsen summoned to the pilot station on shore so that the shore based radar would be operative if it should be needed.*" (Italics supplied.)

It should be noted that Petitioners were careful to eliminate mention of the arrangements for the use of the Long Beach shore-based radar, undertaken prior to the Municipal port pilot's boarding the vessel. After placing Pilot Ougland aboard the ship, the Petitioner's summary merely states (Pet. Br., p. 6):

> "A discussion was had between pilot and master concerning bringing the ship into Long Beach, the decision being to proceed toward the Harbor."

This purported summary should again be compared with the actual testimony of Captain Baura, as set forth in the Court of Appeals' opinion. (Appendix, Opinion of the Ninth Circuit, pp. 2 and 3.) In short, the decision to enter was predicated upon Pilot Ougland's assurances to the DONA AURORA's Master that it was safe to enter, using the shore-based radar. This significant testimony, even in summary form, is carefully avoided by Petitioners.

We might note the significant failure of Petitioners to point out Pilot Ougland's having assumed the conn of DONA AURRORA, *i.e.*, the control of the navigational movement of the vessel, anywhere in their "summary of facts." The impression given is that Long Beach Municipal Port Pilot Ougland was merely another person on the bridge. But, as the Court of Appeals noted (Appendix, Opinion of the Ninth Circuit, Page 3):

> "The district court found that the pilot assumed the conn of the ship, thereafter gave all course and engine orders and was in charge of the navigation and movement of the ship until it grounded on the Long Beach breakwater some fifteen minutes later."

It is interesting indeed to compare the Findings of the District Court, and the Court of Appeals' review of those Findings and evidence, with the three-page statement of Petitioners. Perhaps Petitioners seek to avoid the impact of the Findings and supporting evidence by their statement (Pet. Br. p. 8):

> "The trial court found the respondent pilot negligent in many particulars with which we are not now concerned and do not here dispute."

However, in ignoring all of the Findings, as they relate to the liability of Pilot Ougland and Long Beach pilotage facilities, Petitioners apparently also believe that they can ignore any portion of the factual picture surrounding the casualty which concerns the pilot and pilotage facilities. This removes from the factual picture the man who was found to be in control of the navigation and movement of the vessel, whose every action, and inaction concerning the equipment he neglected to use, critically influenced and controlled the course of events leading to the grounding.

Petitioners' summary also misstates the Findings as they relate to the vessel and her crew. The trial court not only found that there was no contributing fault on the part of DONA AURORA, but also found in an express affirmative finding that the vessel was properly equipped and supplied and manned by a competent crew. [Finding 18.] Apparently the construction of Petitioners would expect a trial judge to make an express finding on each individual essential piece of equipment and each individual crew member. Such is, of course, absurd.

Respondents respectfully refer the Court to the full Findings of the trial judge and to the full opinion of the Court of Appeals.

ARGUMENT.

ALL OF THE QUESTIONS FOR REVIEW AS FRAMED BY THE PETITIONERS ARE PREDICATED UPON FALSE ASSUMPTIONS AND PARTIALLY STATED FACTS.

Before treating each question individually, Respondents must note that by repetition Petitioners again seek to cast this case into a different set of circumstances and state of facts than found by the courts below. Petitioners frame their questions, based upon their partial statement and misstatement of fact, and then proceed to demolish their strawmen. Petitioners' contentions of faulty lookout and miscellaneous alleged faults by the master and others have been twice considered and rejected. In the face of this, to assume, as Petitioners do, that their contentions are now properly found as facts, upon which errors of law can be predicated, completely misstates the record in this case. Petitioners' first question assumes findings *not* made on the subject of lookout

1. **"May a Ship With an Improper Lookout, a Statutory Fault, Ever Be Relieved of the Burden of Proving '* * * Not Merely That Her Fault Might Not Have Been One of the Causes or That It Probably Was Not, but That It Cannot Have Been'? The Pennsylvania (19 Wall. 125, 86 U. S. 148)."**

Petitioners' question as framed is loaded, and the answer is, of course, "No," since the simple statement of the proposition contains its own answer. The fact is, however, that such a question is not present in this case since neither the trial court nor the Court of Appeals found the lookout to have been improper. The

question ignores the substantial evidence supporting the finding of the trial judge that there was no vessel or crew deficiency [Finding 18] and no fault on the part of DONA AURORA or the agents, servants or employees of libelant which caused or contributed to the grounding. [Finding 17.] This substantial evidence was also considered by the Court of Appeals. There is no need to reaffirm the rule of *The Pennsylvania*, 19 Wall. 125, 86 U. S. 148, because that rule stands unaffected by this case. The contentions in regard to the lookout were not only thoroughly considered by the trial court prior to making Findings 17 and 18, but also were thoroughly reviewed by the Court of Appeals.

The substantial evidence that the lookout on DONA AURORA on the morning of August 29, 1955 was entirely proper may best be summarized by a complete reading of the Court of Appeal's opinion, reported at 289 F. 2d 586, and contained in Petitioners' Appendix.

The Petitioners' reargument of lookout sufficiency ignores the pilot's in-person testimony which itself established that Pilot Ougland heard the foghorn on the breakwater which he struck and that a lookout report of unidentified horns would have added nothing to the pilot's knowledge. In short, the carefully reviewed testimony establishes beyond doubt that DONA AURORA was properly manned by a competent crew. As the Court of Appeals noted, the pilot himself, in his report to the United States Coast Guard, (made within a few days after the grounding) made no complaint of improper lookout.

2. **"Does a Finding of Fact Stating 'There Was No Fault Upon the Part of DONA AURORA or the Agents, Servants or Employees of Libelant Which Caused or Contributed to the Grounding,' With No Evidence to Support a Stronger Finding, Present That Degree of Proof Required by The Pennsylvania (19 Wall. 125, 86 U. S. 148)?"**

Petitioners' second question again ignores Finding 18 and also assumes the existence of a non-existent statutory fault.

There was no finding of fault which would invoke *The Pennsylvania* rule and so, quite obviously, there was no need for a finding which would decide that the provisions of the rule were met.

Petitioners again misstate the facts when they indicate that the significant evidence upon which the Findings are based was all by deposition. Actually, the principal evidence bearing upon all issues was largely in-person testimony and the trial court had the benefit of observing the principal witnesses testify in open court, that is, Captain Baura, DONA AURORA'S master, Long Beach Pilot Ougland, Chief Pilot Jacobsen, the Long Beach radio expert Lockard and many others.

3. **"Is a Ship Master, His Ship in Thick Fog, Who by Radar 'Lookout' Observes His Ship to Be on a Collision Course, Ever Excused From Failure to Warn the Pilot, or Acting to Save His Ship? No Ground Rules by This Court Yet Exist Covering This Situation."**

This question is most clearly based upon a misapprehension of the facts as found and reviewed by the courts below. It was clear, and the trial court found, that Pilot Ougland was negligent in the manner in which he attempted to employ the vessel's radar. [Finding 14(g).] Ordinary prudence required that the pilot advise the master of his loss of shore-based radar—which he did not do—and, thereafter, request the master to maintain a continuous radar plot. Petitioners' summary ignores the fact that the pilot did not do so [R. 418-419]. Neither did the pilot request the master to give him any bearing from the ship's radar [R. 395]. In fact, according to the testimony of the master, Pilot Ougland never asked for any information from the ship's radar [R. 124]. As a result, as the trial court found, the master was lead to believe that the ship's navigation was being directed by the pilot based on information the pilot received from the shore-based radar station.

In addition to the above testimony, Petitioners omit the testimony in which the pilot stated that he himself looked at the radar three or four times [R. 423] and saw "an outline similar to what you see on the chart here (indicating)". [R. 423.]

Petitioners, in presenting a slanted summary of only part of the testimony, completely ignore the pilot's own admissions and the effect of the pilot's con-

duct upon the vessel's master. The attempt to select and isolate facts without their surrounding circumstances must be condemned.

A review of all of the evidence shows that the failure to use the radar properly falls upon the shoulders of the navigator responsible for the movement of the vessel; that is, Long Beach Municipal Pilot Ougland.

4. "Did This Court Intend the 'Clearly Erroneous' Rule in McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to Restrict an Appellate Court's Review of a Finding Based on Evidence by Deposition and Exhibit?"

The Petitioners attempt to point up some supposed differences of interpretation by the Circuit Courts concerning the proper scope of appellate review when testimony is all by deposition and not in person. The simple answer to this question is that it does not arise in the present case at all. Captain Baura, DONA AURORA'S master, Long Beach Pilot Ougland, Chief Long Beach Pilot Jacobsen, and many other witnesses testified in person and their significant testimony bore upon all the disputed fact questions which Petitioners would seek now to review. Clearly the proposition of the *Bertel* case is inapplicable here, even as the rule quoted by Petitioners clearly shows:

> "* * * Since all of the evidence was documentary or by deposition and the trial judge did not hear or see the witnesses, we are in as good a position as the lower court to evaluate it. Although under these circumstances the 'clearly erroneous' doctrine is not applicable, Panama

Transport Co. v. The MARAVI, 2 Cir., 165 F. 2d 719; Stockes v. United States, 2 Cir. 144 F 2d 82 * * *."

Bertel v. Panama Transport Co., 202 F. 2d 247, 249.

Findings 17 and 18, like all of the trial court's Findings in this matter, are based upon a variety of substantial evidence, both in person, by deposition, and by Coast Guard hearing transcript. A review of the record readily refutes the claims that these Findings are merely based upon depositions or exhibits and shows the significance of the testimony of the principal in-person witnesses on each and every disputed issue of fact.

5. "Did This Court Intend the 'Clearly Erroneous' Rule of McAllister v. United States (348 U. S. 19, 99 L. Ed. 20, 1954 A. M. C. 1999) to Restrict an Appellate Court's Review of Conclusions of Law, Although Labeled Findings, or Prevent It From Remanding the Case for Additional Findings, or Making Its Own Findings?"

As is clearly seen in any fair reading of the Court of Appeals' opinion, that Court did not fail to review the evidence supporting the Findings of Fact. In fact, the opinion of the Court of Appeals contains such a lengthy examination of the facts that it indicates a very detailed and specific examination.

Petitioners are, of course, in error when they state that "Finding 17 is the only finding made by the trial court bearing upon the conduct of the vessel and crew". As has been noted before, Finding 18 is an express finding, relating to vessel and crew and, in

addition, the specific findings concerning the navigational control and actions by Pilot Ougland also bear directly upon the conduct of DONA AURORA and her crew.

The contention of Petitioners that the lookout did not function has been twice rejected. But even more frivolous is the claim that a specific finding of negligence or non-negligence should have been made concerning each act of the vessel's master. There was a specific finding made on the pilot's responsibility for the improper use of the ship's radar under all the circumstances. Since that responsibility was assigned, and correctly, and the supporting evidence for that finding was reviewed, the present complaint of Petitioners is merely another effort to walk away from the facts.

6. "May the Rule Announced by the Ninth Circuit in The President Van Buren (223 F. 2d 853, 1955 A. M. C. 1294) Be Extended Into Non-Pilotage Waters and Make a Municipality Liable for the Acts of Its Pilots Beyond Its Boundaries and in Waters For Which the Pilot Is Not Licensed, and Waters for Which No Pilot's License Is Authorized or Obtainable?"

This question completely misconstrues the basis of liability on both the *President Van Buren*, 223 F. 2d 853, 1955 A. M. C. 1294 and the present case. Petitioner City of Long Beach contracted to provide competent pilotage and the City directly collected the fees for pilotage. Petitioner City of Long Beach tendered its pilotage services at the arrival buoy, one mile south of the Long Beach Harbor breakwater entrance. The services tendered were not di-

vided in terms of so much for "territorial waters" and so much for "pilotage waters". In short, the very services undertaken were to bring the vessel *safely* into port, which obviously included transiting the breakwater entrance. The absurdity of Petitioners' position is demonstrated by their statement (Pet. Br., p. 21):

> "* * * We agree that it might be inconvenient to change pilots at the imaginary dividing line between harbors. * * *"

There is no confusion of law in this regard. The thrust of the court's Findings and the thrust of the *PRESIDENT VAN BUREN* is that the place where pilotage properly begins is a question of fact and contract. The attempt to withdraw the pilotage services beyond the breakwater entrance is untenable. Most absurd is the statement (Pet. Br., p. 22):

> "A Long Beach municipal pilot could board a ship anywhere in the vast reaches of the Pacific Ocean, and as long as the ship was destined for Long Beach as its next port of call, Long Beach would be liable for the acts of the pilot while assisting."

The answer to this cry of alarm is simple: Long Beach would only be liable if the service the City of Long Beach proffered and negligently performed was pilotage across the ocean. In the present case the City of Long Beach proffered its pilotage services when the Long Beach pilot boat met DONA AURORA in the vicinity of the Long Beach Harbor arrival buoy. This is the place where the U. S. Coast Pilot, the official United States Government publication, carried aboard DONA AURORA, advises the

foreign shipmaster that he will meet the Long Beach pilot [R. 177]. Obviously, it is within the power of the City of Long Beach to tender its pilotage services at a place of its choice. However, as found by the trial court, the assumption of the conn of a vessel outside of the restricted breakwater entrance by a local pilot, is a matter of sound seamanship, and is the fact.

Conclusion.

Municipal pilotage is under no threat from this decision. Incompetent and dangerous pilotage is all that was condemned. The present petition merely represents another attempt by the Petitioners to walk away from the facts. This effort has been twice rejected, after most thorough review, by the trial court and the Court of Appeals. The purported "questions presented for review" are framed in terms of misconstruction of the facts, as found and reviewed by the courts below, and are not properly presented here. The Petitioners have misapplied pedestrian propositions of law that need no review.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Date: September 22, 1961.

Respectfully submitted,

WILLIAM A. C. ROETHKE,
Attorney for Respondent, National Development Company.

Of Counsel:

LILLICK, GEARY, MCHOSE,
ROETHKE & MYERS,
KENNETH E. KULZICK.